A

GHAZALEE KASSIM & ORS

v.

PP

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
HASHIM YUSOFF FCJ
MOHD GHAZALI YUSOFF FCJ
[CRIMINAL APPEAL NOS: 05-53-08 (J),
C 05-54-08 (J) & 05-55-08 (J)]
17 JUNE 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in cannabis - Appeal against convictions - Delay by trial judge*
D *in calling for defence - Failure of prosecution to offer witness to defence - Whether common intention under s. 34 Penal Code proven - Whether "Indian Hemp" fell within definition of "dangerous drugs"*

CRIMINAL PROCEDURE: *Judge - Delay - Delay by trial judge in*
E *deciding to call for defence - Whether prejudicial and caused injustice*

CRIMINAL PROCEDURE: *Defence - Calling for defence of accused - Delay by trial judge - Whether prejudicial and caused injustice*

CRIMINAL PROCEDURE: *Prosecution - Calling witnesses - Failure*
F *of prosecution to call or offer appellants a witness to defence - Whether fatal to prosecution's case*

EVIDENCE: *Witness - Calling of witness by prosecution - Whether prosecution's failure to call or offer appellants a witness to defence fatal to*
G *prosecution's case*

CRIMINAL PROCEDURE: *Witness - Calling of witness by prosecution - Whether prosecution's failure to call or offer appellants a witness to defence fatal to prosecution's case*

H ***CRIMINAL LAW:*** *Penal Code - Section 34 - Common intention - Trafficking in cannabis - Whether elements of common intention proven*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in cannabis - "Indian Hemp" - Whether fell within definition*
I *of "dangerous drugs" - Whether possession thereof amounted to an offence*

These were appeals by the three appellants, who were jointly charged for drug trafficking (50,659 grams of cannabis) under s. 39B of the Dangerous Drugs Act 1952 ('Act') read with s. 34 of the Penal Code ('Code'), against their convictions which were upheld by the Court of Appeal. The main ground of appeal by the three appellants was the delay by the trial judge, who took some four years and five months to decide to call for their defence, which, the appellants submitted, had prejudiced them. The other three grounds raised by the appellants were: (i) the failure of the prosecution to call or offer to the appellants a person known as "Ah Meng" as a witness to the defence; (ii) whether common intention under s. 34 of the Code had been proven; and (iii) since cannabis was also known as "Indian Hemp", possession thereof did not amount to an offence.

Held (dismissing the appeals)
Per Zaki Tun Azmi CJ delivering the judgment of the court:

(1) A detailed perusal of the grounds of the trial judge's judgment showed that he had analysed the facts thoroughly; in fact, the appellants had not indicated at all that the trial judge failed to do so. Therefore, on the facts of this case, the delay by the trial judge in calling for the defence had not caused any injustice. (paras 10 & 11)

(2) There was no evidence to show that the prosecution had intentionally withheld the production of Ah Meng as a witness. In fact, according to one ASP Zulkifly Ali, Ah Meng could not be traced. Anybody in Ah Meng's position would have just lost himself. To be traced and to come to court after leading the police to the arrest of the three appellants would be to expose himself to, possibly, death. Also, although there was no obligation on the defence to assist the police in any way in their investigation the 3rd appellant could have, on the facts, given information to the police as to where Ah Meng could be found. (para 20)

(3) The offence of which the appellants were charged with was for trafficking in dangerous drugs. Trafficking includes the act of selling, and selling involves transfer of money as consideration for delivery of the drugs. There was only one conclusion to be derived from the facts adduced by the prosecution and that was while the 3rd appellant collected the

A cash for payment of the sale of the cannabis at Lion City Hotel, the 1st and 2nd appellants were responsible for delivering it at Merlin Inn Hotel. It was, therefore, clear that the 3rd appellant had pre-arranged and acted in concert with the 1st and 2nd appellants to traffic in the cannabis. Hence, B all three appellants had acted with common intention. (paras 24 & 25)

(4) Although cannabis is known by different names all over the world, the chemical constituents of that item are the same. It C is the resin contained in the cannabis (or Indian Hemp) that is the deleterious part of the dangerous drug. As far as the issue of "Indian Hemp" is concerned, there was no basis to hold that because cannabis can also be called "Indian Hemp", the drugs seized, which formed the basis of the charge, hence D did not fall within the definition of "dangerous drugs" under the Act. (para 26)

(5) On these findings, all the three appellants' appeals ought to be dismissed, and their convictions and sentences upheld. (para 27)

E

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan-rayuan dari ketiga-tiga perayu, yang telah dituduh bersama mengedar dadah (50,659 gram kanabis) di bawah F s. 39B Akta Dadah Berbahaya 1952 ('Akta') dibaca bersama-sama dengan s. 34 Kanun Keseksaan ('Kanun'), terhadap sabitan-sabitan mereka yang telah disahkan oleh Mahkamah Rayuan. Alasan utama rayuan oleh ketiga-tiga perayu ialah kelewataan oleh hakim perbicaraan, yang telah mengambil masa sebanyak empat G tahun dan lima bulan untuk memutuskan bagi memanggil untuk pembelaan mereka, yang mana perayu-perayu menghujah, telah memprejudiskan mereka. Ketiga-tiga alasan lain yang dibangkitkan oleh perayu ialah: (i) kegagalan pendakwaan untuk memanggil atau menawar kepada perayu-perayu seorang yang dikenali sebagai "Ah H Meng" sebagai saksi untuk pembelaan; (ii) sama ada niat bersama di bawah s. 34 Kanun telahpun dibuktikan; dan (iii) oleh kerana kanabis juga dikenali sebagai "Indian Hemp", milikan atasnya oleh itu tidak merupakan suatu kesalahan.

I

Diputuskan (menolak rayuan-rayuan)
Oleh Zaki Tun Azmi KHN menyampaikan penghakiman mahkamah:

(1) Sesuatu penelitian terperinci alasan-alasan penghakiman hakim perbicaraan menunjukkan bahawa beliau telah menganalisis fakta-fakta dengan sepenuhnya; sebenarnya, perayu-perayu tidak memberi apa-apa indikasi bahawa hakim perbicaraan telah gagal berbuat demikian. Oleh itu, atas fakta-fakta kes semasa, kelewataan oleh hakim perbicaraan memanggil untuk pembelaan tidak menyebabkan apa-apa ketidakadilan.

(2) Tidak ada keterangan untuk menunjukkan bahawa pendakwaan telah dengan sengaja menghalang Ah Meng dikemukakan sebagai seorang saksi. Sebenarnya, mengikut seorang ASP Zulkifly Ali, Ah Meng tidak dapat dijumpai. Sesiapa pun dalam posisi Ah Meng akan menghilang diri. Untuk dijumpai dan untuk dihadapkan di mahkamah selepas membawa polis kepada penahanan ketiga-tiga perayu ialah untuk mendedahkan dirinya kepada, kemungkinannya, maut. Juga, walaupun tiada obligasi bagi pembelaan untuk menolong polis dalam apa cara pun dalam penyiasatan mereka perayu ketiga boleh, atas fakta-fakta, memberi informasi kepada polis mengenai di mana Ah Meng boleh dijumpai.

(3) Kesalahan yang perayu-perayu telah dituduh dengan ialah mengedar dadah berbahaya. Mengedar termasuk perbuatan menjual, dan menjual melibatkan pemindahan wang sebagai balasan untuk penghantaran dadah. Hanya satu kesimpulan yang boleh dibuat dari fakta-fakta yang dikemukakan oleh pendakwaan iaitu sementara perayu ketiga memungut wang bagi pembayaran untuk penjualan kanabis di Hotel Lion City, perayu-perayu pertama dan kedua bertanggungjawab untuk penghantarannya ke Hotel Merlin Inn. Ia adalah, oleh itu, jelas bahawa perayu ketiga telah mengatur terlebih dahulu dan bertindak bersama dengan perayu-perayu pertama dan kedua untuk mengedar kanabis. Oleh yang demikian, ketiga-tiga perayu telah bertindak dengan niat bersama.

(4) Walaupun kanabis dikenali dengan nama-nama berbeza di sekitar dunia, juzuk kimia item itu adalah sama. Ia ialah resin yang dikandungi dalam kanabis (atau Indian Hemp) yang merupakan bahagian dadah berbahaya itu yang merosakkan

A kesihatan. Setakat isu "Indian Hemp" itu, tiada apa-apa asas untuk mendapati bahawa hanya sebab kanabis boleh juga dipanggil "Indian Hemp", dadah yang dirampas, yang membentuk asas tuduhan itu, oleh itu tidak terangkum dalam definasi "dadah berbahaya" di bawah Akta.

B

(5) Berdasarkan dapatan-dapatan ini, kesemua ketiga-tiga rayuan perayu seharusnya ditolak, dan sabitan-sabitan dan hukuman-hukuman mereka disahkan.

Cases(s) referred to:

C *Amathevelli P Ramasamy v. PP [2009] 3 CLJ 109* ***(refd)***
Mohamed Abdullah Abdul Razak v. PP [2000] 2 SLR 789 ***(refd)***
Mohd Shamshir Mohd Rashid v. PP [2008] 6 CLJ 738 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

D *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC* ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***
Tan Hun Wah v. PP And Another Appeal [1994] 2 CLJ 180 ***(refd)***

Legislation referred to:

E Dangerous Drugs Act 1952, ss. 2, 39B, 40A
Evidence Act 1950, s. 114(g)
Penal Code, s. 34

For the appellants - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Manoj Kurup DPP

F

[Appeals from Court of Appeal, Criminal Appeal Nos: J 05-7, J 05-8 & J 05-9-2007]

[Editor's note: For the Court of Appeal judgment, please see Ghazalee Kassim & Ors v. PP [2008] 4 CLJ 431.]

G

Reported by Suresh Nathan

JUDGMENT

H **Zaki Tun Azmi CJ:**

Introduction

[1] All the three appellants were jointly charged for drug trafficking under s. 39B of the Dangerous Drugs Act 1952 ("the Dangerous Drugs Act") read with s. 34 of the Penal Code ie, for acting with a common intention. They now appeal against their convictions which were upheld by the Court of Appeal.

I

[2] For the purpose of these appeals, Mohd. Junaidi bin Hussin will be referred to as the 1st appellant, Mohd Salleh bin Yunos the 2nd appellant and Ghazalee bin Kasim the 3rd appellant as they were described as the 1st to the 3rd accused respectively by the High Court.

[3] The amount of drugs involved was 50,659 grams of Cannabis.

[4] It was unfortunate that the trial judge took some four years five months to decide to call for defence. According to the appellants, the delay had prejudiced them. The appellants raised the same issues before the trial judge. This was the main ground of appeal raised by all three appellants.

[5] The other three grounds raised were the failure of the prosecution to produce or offer to the appellants a person known as "Ah Meng"; the issue of common intention and that because Cannabis was also known as "Indian Hemp", possession thereof does not amount to an offence.

Delay

[6] According to the appellants delay by the judge had caused miscarriage of justice to them and because of the delay, the appellants were no longer confident to give their defence on oath as they may have forgotten parts of the evidence and also unable to locate witnesses to support their defence.

[7] Delay whether in commencing a case, calling for defence, making the decision at the end of a trial or writing out grounds of judgment, may cause injustice. It is an act which is frowned upon or even detested by everyone including the appellate courts. Trial judges should make their decisions as early as possible and thereafter write their grounds. In fact, in cases involving death penalties, where every conviction will definitely be appealed against by the convicted person right up to the apex court, there is no reason why trial judges should not write their grounds even before delivering their decisions. It is not like other cases where there may not be an appeal. On the other hand, the Courts must also view a case from the angle of public interest. It would be against public interest to let off a person when there is no doubt that he has committed the offence even though there had been delay. Delay *per se* cannot be construed as a miscarriage of justice.[1] They depend on the facts of each case.

[8] One of the factors in considering the ability of a good judge is how up to date he is with his grounds of judgments. A judge who finds difficulty in making a decision is not a good judge. A reasonable time must be allowed to enable a judge to weigh the evidence and to check and read up the law. It is also realised that some may take more time than others. A decision made in a rush is also not a good decision lest the judge has not properly considered the factual and legal issues thoroughly. On the other hand, extreme delay can be damaging to all concerned, whether to the prosecution or the defence.

[9] In the case before us, the Court of Appeal had correctly analysed the grounds of judgment of the trial judge and rightly concluded that the delay had not caused injustice.

[10] The Court of Appeal had thoroughly analysed a long list of authorities against the facts of this case before concluding that delay of calling for defence on the facts of this case, had not resulted in injustice to any of the three appellants. The Court of Appeal rightly concluded that the learned trial judge's grounds of judgment supported his finding of a *prima facie* case. The learned trial judge had thoroughly evaluated the facts adduced by the prosecution before coming to the conclusion that there was *prima facie* case proven. In other words, he had applied the maximum evaluation of the prosecution's case. We can recite the finding of facts by the learned trial judge here but to do so would in our opinion be pure repetition. What is important is that we have gone through in detail the grounds and are satisfied that the learned trial judge had analysed the facts thoroughly. In fact, the appellant had not indicated at all that the trial judge had failed to do so.

[11] On this ground of appeal, we therefore find that on the facts of this case (and we stress, "on the facts of this case") the delay by the learned trial judge in calling for the defence had not caused any injustice.

[12] We must however remind all trial judges that this case is not to be taken as precedent for an excuse to take too much time to decide and write their grounds of judgment. For myself, the President of the Court of Appeal, Chief Judge of Malaya as well as the Chief Judge of Sabah and Sarawak, we are closely monitoring that there should not be unnecessary delay by trial

judges in commencing a case, calling for defence, making the decision at the end of a trial and writing out grounds of judgment. Steps are also being taken by the judiciary in all areas to speed up dispensation of justice without compromising the quality of justice.

"Ah Meng"

[13] The appellants, particularly the 3rd appellant next argued that the failure to call or offer "Ah Meng" as a witness to the defence is fatal to the prosecution's case.

[14] Briefly, the prosecution's case is that the 1st and 2nd appellants were arrested with the Cannabis found in the boot of the car WFJ 7045 to which the 1st appellant held the keys. The 2nd appellant was with the 1st appellant. In the meantime, the 3rd appellant met PW10 at the Lion City Hotel to collect RM70,000 as payment for the Cannabis.

[15] Who was Ah Meng? Was Ah Meng an informer or was he an agent provocateur? Does it make any difference whether Ah Meng is an informer or agent provocateur? Has the failure of the prosecution to call Ah Meng or offer him as a witness to the defence prejudiced the appellants? On the facts of this case, has it raised any reasonable doubt as to the guilt of the appellants?

[16] The name Ah Meng came about during cross examination of PW5. The defence was that Ah Meng was "an active participant in the transaction, who brought the drugs from Kuala Lumpur to Johor Bahru and was present in the Lion City Hotel with PW10, the undercover agent." This statement by the 3rd appellant was without support and on the facts of this case cannot be reasonably accepted. Lion City Hotel was the place where the exchange of cash was to take place. These allegations by the appellants were however denied by the prosecution. Subsequently, during the trial, evidence was adduced by the prosecution by recalling ASP Zulkifly bin Ali (PW4) that attempts to locate Ah Meng was unsuccessful. Another reason why the trial judge held that the failure to call Ah Meng as a witness or to offer him as a witness was not fatal to the prosecution's case was that "there was no evidence other than that of the defence seeking to cast him as an agent provocateur that Ah Meng was other than an informant." In other words, according to the 3rd appellant, if Ah

Meng had been accepted as an informer, the prosecution is not obliged to produce him[2]. On the other hand, according to the appellants, if Ah Meng is an agent provocateur, the prosecution would have been obliged to produce him.

[17] Section 40A of the Dangerous Drugs Acts, places an agent provocateur's evidence no less credible than any witness merely by virtue of him being such. The reason according to the 3rd appellant why he wanted Ah Meng was to support his defence that he was, at the Lion City Hotel, to meet Ah Meng to collect a gambling debt. According to the 3rd appellant, Ah Meng had a gambling debt amounting to RM25,000 owing to him. Assuming that this is so, why did he count the money brought by the prosecution witness PW10 amounting to RM70,000 instead of just asking for the RM25,000 allegedly owed to him? There was no indication that he questioned why there was RM70,000 instead of RM25,000.

[18] The appellant asked us to invoke s. 114(g) of the Evidence Act 1950 ("Evidence Act") and to hold that failure to produce Ah Meng as witness is fatal to the prosecution's case. On the facts of this case we do not think we should invoke s. 114(g) of the Evidence Act.

[19] The court will only invoke s. 114(g) of the Evidence Act for failure to call a witness if it is of the opinion that the prosecution does so to withhold or suppress evidence which, if produced could be construed against the prosecution or otherwise in favour of the accused.[3] The prosecution can also, in the alternative, offer to the defence any witness which they do not wish to call. As to which witness the prosecution chooses to call is entirely up to them. Calling a wrong witness may be detrimental to their case. The same goes if they fail to call a material witness. This is where s. 114(g) of the Evidence Act may be invoked by the court.

[20] In *Mohd Shamshir Mohd Rashid v. PP*[4] the Court of Appeal discussed at length the prosecution's discretion whether to call a witness or not and the implications for not doing so. In this appeal before us, there is no evidence to show that the prosecution had intentionally withheld the production of Ah Meng as witness. In fact, as mentioned earlier, according to the PW4, Ah Meng could not be traced. Anybody in Ah Meng's position

would have just lost himself. To be traced and to come to court after leading police to the arrest of the three Appellants is going to expose himself to, possibly, his death. The other way of looking at the issue is, if it is true that the Ah Meng owes the 3rd appellant RM25,000, Ah Meng must have been a big time gambler. If he is so, he must be quite well known for the appellant, at least, to assist the police in tracing Ah Meng. We bear in mind that there is no obligation on the defence to assist the police in any way in their investigation[5] but on the facts of this case, if what the 3rd appellant say is true, then he should be able to give some information to the police as to where Ah Meng could be found.

Section 34 Of The Penal Code

[21] The issue as to whether common intention under s. 34 of the Penal Code was proven was also raised.

[22] Section 34 of the Penal Code is invoked by the prosecution in order to prove that although an accused did not directly commit the criminal act, he was involved in a series of other acts with the others to show that he had the common intention of committing that criminal act with the others. The accused need not be present together with the others who had committed the actual criminal act.[6] It is sufficient that he participated jointly with the others. It must however be shown that there was a prior arranged plan with the others. In other words, all those who are charged pursuant to s. 34 of the Penal Code, must have the common intention to commit the offence charged.

[23] On the facts of this case, it was proven beyond any reasonable doubt that the 3rd appellant was in the room to collect the money as payment for the sale of the drugs while the 1st and 2nd appellants were delivering the drugs. The 3rd appellant in his unsworn statement said he was there to collect RM25,000 gambling debt from Ah Meng. However, as earlier mentioned, it was not disputed in cross examination that the amount of cash brought by PW10 was RM70,000. According to PW10, the RM70,000 cash was counted by the 3rd appellant himself. This was of course denied by the 3rd appellant in his unsworn statement.

[24] The offence for which the appellants were charged with was for trafficking in dangerous drugs. Trafficking includes the act of selling. And selling involves transfer of money as consideration for delivery of the drugs. (See the definition of trafficking under s. 2 of the Dangerous Drugs Act). There is only one conclusion to be derived from the facts adduced by the prosecution and that is while the 3rd appellant collected the cash for payment of the sale of the Cannabis at Lion City Hotel, the 1st and 2nd appellants were responsible for delivering it at Merlin Inn Hotel. It is therefore clear that the 3rd appellant had prearranged and acted in concert with the 1st and 2nd appellants to traffic in the Cannabis. From the grounds of judgment of the trial judge, this was what he concluded.

[25] The trial judge found that the 3rd appellant's statement from the dock that he was at the Lion City Hotel to collect upon a gambling debt from Ah Meng was only possibly true but did not raise any reasonable doubt and that all the three appellants therefore acted with common intention. We find that there is nothing wrong with this conclusion and agree with his findings.

Cannabis/Indian Hemp

[26] As was submitted by the respondent, Cannabis is known by different names all over the world. The chemical constituents of that item are the same. It is the resin contained in the Cannabis (or Indian Hemp) that is the deleterious part of the dangerous drug. As far as the issue of "Indian Hemp" is concerned, we do not think there is any basis to hold that because Cannabis can also be called "Indian Hemp" therefore the drugs seized, which formed the basis of the charge, did not fall within the definition of "dangerous drugs" under the Dangerous Drugs Act.

Conclusion

[27] On these findings, we dismiss all the three appellants' appeals and affirm and uphold their convictions and sentences.

Endnote:

1. See Arifin bin Zakaria CJM in *Amathevelli P Ramasamy v. PP* [2009] 3 CLJ 109 at p. 116; Haji Mohd Azmi bin Dato' Haji Kamaruddin SCJ in *Tan Hun Wah v. PP And Another Appeal* [1994] 2 CLJ 180, p. 184.
2. See s. 40 of the Dangerous Drugs Act.
3. See Mohamed Azmi SCJ in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, Edgar Joseph Jr. FCJ in *Pekan Nenas Industries Sdn. Bhd. v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793 (FC).
4. [2008] 6 CLJ 738 at p. 768.
5. See Yong Pung How CJ in *Mohamed Abdullah s/o Abdul Razak v. Public Prosecutor* [2000] 2 SLR 789 (HC) at p. 805.
6. See Gopal Sri Ram JCA in *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466 (CA) at p. 482.